IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12913 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 & 2 YES; 3 to 5 NO

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M.D.DODIYA - Petitioner(s)

Versus

DISTRICT DEVELOPMENT OFFICER & 1 - Respondent(s)

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Appearance :

MR IS SUPEHIA for Petitioner(s) : 1,
MR HS MUNSHAW for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 02/02/2006

ORAL JUDGMENT

1. Invoking Article 226 of the Constitution, the petitioner, a retired Head Clerk-cum-Accountant under the District Panchayat, Surendranagar, has prayed to set aside the charge-sheet dated 4/9.12.2003 with

a direction to fix his final pension and other retiral benefits ordering payment of the same with interest.

2. The undisputed facts are that the petitioner was allowed to retire on 31.8.2003 upon reaching the age of superannuation with the clear stipulation in the order dated 30.8.2003 itself that, by order dated 29.8.2003, a show cause notice was issued as to why disciplinary action for major punishment should not be imposed and it was, *prima facie*, found that the irregularities alleged against him could result in major punishment. It was, therefore, clarified in the order that it was necessary to continue further proceedings pursuant to the said notice dated 29.8.2003 and the petitioner was allowed to retire subject to further proceedings in accordance with the provisions of Rule 189 of the Bombay Civil Services Rules, 1959 (“the BCSR” for short) and Rule 24 of the Gujarat Civil Services (Pension) Rules, 2002 (“the GCSR” for short). Subsequently, the petitioner was served with the charge-sheet dated 4/9.12.2003 alongwith details thereof and list of evidence, and the departmental enquiry was commenced. However, by filing the present petition, the petitioner insisted upon payment of provisional pension

and contended that the enquiry could not have been initiated without prior sanction of the Governor. On that basis, an interim order dated 2.11.2004 was passed stating that: *"At the request of the learned counsel for the respondent, S.O. to 7.12.2004. In the meantime, the departmental proceedings initiated against the petitioner vide charge-sheet dated 4/9.12.2003 shall remain stayed....."*. It appears that that interim order has remained effective without being renewed or extended by any subsequent order and then the learned counsel have argued the matter for final disposal.

3. The short question which arises for consideration is, whether, despite the so-called show cause notice dated 29.8.2003 and clear indication of continuation of the disciplinary proceeding under Rule 189 of the BCSR in the order retiring the petitioner, sanction of the Governor was required for proceeding with the departmental enquiry ? The answer to that issue would depend upon the point of time when the departmental proceeding can be said to have been instituted. The relevant provisions relied upon by the learned counsel may be reproduced hereunder for easy reference:-

*"**Rule 189-A of the BCSR:** The Governor reserves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including services rendered upon re-employment after retirement:*

Provided that-

(a) *such departmental proceeding, if instituted while the Government servant was in service whether before his retirement or during his re-employment shall after the final retirement of the Government servant be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the Government servant had continued in service;*

(b) *such departmental proceeding if not instituted while the Government servant was in service, whether before his retirement or during his re-employment-*

(i) shall not be instituted save with the sanction of the Governor;

(ii) shall not be in respect of any event which took place more than 4 years before such institution; and

(iii) shall be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relations to the Government servant during his service:

(c) xxx xxx xxx
(d) xxx xxx xxx

***Explanation**: For the purpose of this rule-*

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) *a judicial proceeding shall be deemed to be instituted-*

(i) in the case of a criminal proceeding on the date on which the complaint or report of the police officer on which the Magistrate takes cognizance, is made, and

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the court."

"Rule 24 Gujarat Civil Services (Pension) Rules, 2002: Right of Government to withhold or withdraw pension:

(1) Government may, by order in writing, withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and also order the recovery from such pension, the whole or part of any pecuniary loss caused to Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

***Provided** xxx xxx xxx*

***Provided** further xxx xxx xxx*

(2)(a)The departmental proceedings referred to in sub-rule (1), if instituted while the Government employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the Government employee, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government employee had continued in service.

(b) The departmental proceedings, if not instituted while the Government employee was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and at such place as the Government may direct and in accordance with the procedure applicable to the departmental proceedings in which an order of dismissal from service could be made in relation to the Government employee during his service.

(3) In case of Government employee who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule 144 to 146 shall be sanctioned.

(4) Where Government decides not to withhold

or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not, subject to the provisions of sub-rule (1) of this rule, ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government employee.

(5) For the purpose of this rule:-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government employee or pensioner, or if the Government employee has been placed under suspension from an earlier date, on such date, and

(b) judicial proceedings shall be deemed to be instituted-

(i) in case of criminal proceedings, on the date on which the complaint or report is made by a police officer of which the Magistrate takes cognizance, and

(ii) in case of civil proceedings, on the dace of presenting the plaint in the court."

4. It is clear from the reading of the above provisions that departmental proceeding, if instituted while the Government employee was in service, has to be deemed to be a proceeding under Rule 189-A of the BCSR or Rule 24 of the GCSR, as the case may be, and has to be continued and concluded by the authority by which they were commenced. The question of sanction of the Governor and the requirement of

limitation of four years from the event in respect of which the proceedings are instituted, arise only if the departmental proceeding is not instituted while the Government servant was in service. Therefore, ordinarily, sanction of the Governor will have to be sought before instituting a departmental proceeding against the retired employee but, if the proceedings were already instituted, the authority would be duty bound to continue and conclude the same.

5. Learned counsel for the petitioner, Mr.Supehia, pointedly argued that the departmental proceedings cannot be said to be instituted unless and until a charge-sheet was issued. He relied upon the judgment of this Court in ***K.B.DESAI v. STATE & ANR. [1984 (1) G.L.R.556],*** wherein the following observations were made:

> *"7. However, Mr.Jadeja, learned advocate appearing for the State Government has submitted that some notice had been issued to the petitioner for the alleged misconduct prior to his retirement. I am afraid, the submission of Mr.Jadeja cannot be accepted because any notice for the purpose of getting explanation of the delinquent officer is not relevant. The material date for attracting provisions of Rule 189-A is initiation of the departmental enquiry. It has been settled by numerous decisions of this Court and the Supreme Court that a departmental enquiry can be said to have been initiated when the show-cause notice is served upon the delinquent*

officer. However, Rule 189-A itself provides the clear answer to the submission of Mr.Jadeja. Explanation to Rule 189-A, reproduced above, is material for this purpose."

(emphasis supplied)

The learned counsel also relied upon the following observations of the Supreme Court in ***UNION OF INDIA v. K.V.JANKIRAMAN [AIR 1991 SC 2010]:***

"6. On the first question, viz. as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed-cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the

authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalize the charges.....”

6. The learned counsel for the respondent relied upon the affidavit of District Primary Education Officer to submit that the petitioner was already issued a show cause notice before he attained the age of superannuation and thereafter a charge-sheet was issued on 9.12.2003. The irregularities alleged against the petitioner had come to the notice at a late stage and even the relevant audit report was received by the authority in the month of August, 2003.

7. In the above facts and circumstances, it would be necessary to cull out the policy and purpose of the above rules which are obviously intended to ensure continuation of the departmental proceedings if they were instituted before the date of retirement and not to permit fresh institution after retirement, except with the sanction of higher executive authority of the State. It is a commonplace that issuance of a charge-sheet is considered and taken as initiation of departmental proceeding in common as well as legal parlance. And, no further explanation or

clarification was required if that meaning were to be accepted for the purpose of application of the provisions of Rule 189-A of the BCSR or Rule 24 of the GCSR, as the case may be. However, the addition of an explanation obviously to give an extended meaning and incorporation of a deeming clause by way of an explanation would indicate that the incidents which otherwise might not have been taken to be institution of departmental proceeding are sought to be covered by the deeming fiction. Therefore, even if the incident of placing a Government employee under suspension would not ordinarily be taken as institution of departmental proceeding, it has to be deemed to be such institution. It is conceivable that when a Government employee is suspended but even a show cause notice is issued after his retirement, departmental proceeding would still be deemed to have been instituted before the date of his retirement. Similarly, in case of a criminal proceeding, the date on which the Magistrate takes cognizance of a complaint or a report of a police officer and, in case of a civil proceeding, the date on which plaint is presented in the Court against the delinquent, has to be, by the deeming fiction, taken to be the institution of departmental proceeding. Therefore, in short, institution of

departmental proceeding is given a different meaning for the purpose of the aforesaid rules and the clause relevant for the present purpose, i.e. “the date on which statement of charges is issued”, has to be construed accordingly. If the words “*statement of charges*” were to only mean a charge-sheet which, in the common parlance and in ordinary course, may be the starting point of departmental enquiry, no explanation in that regard was required to be statutorily added. Therefore, the phrase: “*shall be deemed to be instituted on the date on which the statement of charges is issued*” has to be liberally interpreted for ensuring its intended effect and issuance of any statement containing the charges, whether to call for explanation or to afford an opportunity to defend, has to be deemed to be institution of departmental proceedings.

8. A statement of charges could be prepared only after the charges levelled against the employee have crystallized and are identified on the basis of the facts available with the disciplinary authority. No sooner such charges are articulated and a statement thereof is issued to the delinquent, whether in the form of a show cause notice or a charge-sheet,

it can be said that a statement of charges is issued.

9. In the facts of the present case, not only that the petitioner was made aware about the charges levelled against him in the order permitting him to retire but the detailed show cause notice of 29.8.2003 clearly stated that, in view of the audit report of the years 1999 and 2000, financial irregularities detailed therein were detected. After details of the acts of misconduct alleged against the petitioner, it is stated that, *prima facie*, negligence in the discharge of duties resulting in serious accounting and financial irregularities were found and hence the petitioner should explain why he should not be held responsible and why disciplinary action/punitive action should not be taken against him. Therefore, factually, the charges against the petitioner have not only been culled out from the material appearing against him, but communicated to him with all the relevant details. Therefore, the extended meaning sought to be granted by the explanation in the aforesaid rules and the mandatory deeming fiction would apply in case of the petitioner and the requirement of sanction of the Governor could not be invoked. Instead, the disciplinary proceeding initiated as above must

be continued and concluded under the mandatory provisions of the Rules.

10. The above-mentioned judgment of this Court and particularly the observations which are underlined convey a contradictory message. And, the judgment of the Supreme Court was rendered in the context of sealed-cover procedure expressly in view of the inordinately long time taken in completing preliminary investigations during which promotion ought not to be withheld. Such suffering is mitigated in the case falling under the GCSR by Rule 24 (3) thereof as reproduced hereinabove. Further, the Hon'ble Supreme Court was not dealing with the exact connotation of the word "*charge-memo*" or "*charge-sheet*" and the extended meaning and the deeming fiction expressly provided in Rule 189-A of the BCSR or Rule 24 of the GCSR were not under consideration. Therefore, with respect, the above decisions cannot be applied to scuttle an enquiry which was expressly envisaged at the time of retirement of the petitioner.

11. The other arguments of learned counsel Mr.Supehia about delay in initiating the disciplinary action against the petitioner had no substance in view of the fact that the charges of acts of serious misconduct were not

related to any event which had happened in the distant past.

12. In the facts and for the reasons discussed herein, the petition is rejected and Notice is discharged with no order as to costs.

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)